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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 506 .

ACCINANTO LTD., *et al.*,

Petitioners,

—against—

A/S J. LUDWIG MOWINCKELS REDERI and COSMOPOLITAN SHIPPING CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

HENRY N. LONGLEY,
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Attorneys for Petitioners.

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ACCINANTO LTD., *et al.*,

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A/S J. LUDWIG MOWINCKELS REDERI and COSMOPOLITAN SHIPPING CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners:

Accinanto Ltd.; New Hampshire Fire Insurance Company; Chisholm-Rider Co., Inc.; Arthur Pollak; Intermares Corp.; Samuel Dreisin and Eugene Dreisin, co-partners d/b/a S. Dreisin & Son; Leopold Berael; Fire Association of Philadelphia; Societe Roblou, S. A. R. L.; S. A. R. L. Chrislie; Soc. Anon. A. C. B. I.; N. V. Aan-En Verkoopvennootschap Van Den Belgischen Borenbond; S. A. Jean Delvaux; Vve C. Schoolmeesters; Providence Washington Insurance Co.; Tip-Top Garage, A.-G.; Royal Insurance Company, Ltd.; Goodyear International Rubber Ex-

port Co., Inc.; Isbecque-Todd, S. A.; St. Paul Fire and Marine Insurance Co.; Nash-Kelvinator Corp.; Lou Bunin Productions, Inc.; Chemo-Puro Manufacturing Corp.; Edelco International Corp.; Rudolf Kellerman, Inc.; Stenson Export Trading Co.; Gold Leaf & Metallic Powders, Inc.; Inter Allied Industrial Corp.; International Harvester Export Co.; Alexander Saccerd; General Motors Corporation; Joseph Rappaport, Arthur Rappaport, David Bly and Herman Wachs, co-partners d/b/a Jardox Fur Co.; The Bastian-Blessing Company; The Automobile Insurance Company of Hartford, Connecticut; Atlantic Mutual Insurance Company; International Harvester Export Company; E. I. Dupont de Nemours & Company; International Selling Corporation; Adolph Bass; Glens Falls Insurance Company; Orient Insurance Company; Ottis Lucas; Commercial Solvents Corporation; Gregory Salomon & Sons, Inc.; Sinason-Zeitlin, Inc.; Ford S. A. F. Poissy; S. A. Cima-Wallut; Michael A. Embiricos; Socabex S. A.; Pierre Welter; Le Doux & Mortelmans, S. P. R. L.; Merchants' Forwarders, Inc.; D. C. Andrews & Co., Inc.; Markt & Hammacher Company; National Cash Register Company; Norwich Union Fire Insurance Society, Ltd.; Commerce Insurance Company, S. A.; Loiret y Haentjens; General Motors Continental, S. A.; Interhand, Mercury Technical Cloth & Felt Corporation; Rohner, Gehrig & Company, Inc.; Groupement d'Importation des Cuirs et Peaux Bruts; Penwick, S. A. Cooperation Pharmaceutique Francaise; Groupement d'Achat des Carburants; Max David; S. A. R. L.; United Nations Educational, Scientific and Cultural

Organization; Ste. Commerciale Lambert-Riviere; Ste. d'Etudes et de Coordination d'Enterprises de Caoutchoug et de Matieres Plastiques, S. A.; Boston Insurance Company; Eugene, Ltd.; C. L. Hauthaway & Sons, Inc.; Manufacture d'Encres Hayon, S. C.; Manufacture Belge de Rubans & Carbones S. A.; Aetna Insurance Company; A. W. Fenton and C. J. McFarland, co-partners, d/b/a The A. W. Fenton Company; Fabrik fur Firestone Produete, A. G.; Switzerland General Insurance Co., Ltd.; D. C. Andrews & Co., Inc.; La Prevoyance Compagnie d'Assurances et de Reassurances des Risques de Toute Nature, S. A.; La Concorde Compagnie d'Assurances Contre les Risques de Toute Nature, S. A.; S. A. d'Assurances Contre les Accidents de Toute Nature l'Urbaine et la Seine;

pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Opinions Below.

The opinion of the District Court for the District of Maryland, reported at 99 F. Supp. 261, appears in "Ship Appendix" (at pp. 46-63).* There was a supplemental memorandum (Ship App. 68) and the Court filed detailed findings of fact and conclusions of law (Ship App. 28-46). The opinions of the Court of Appeals for the Fourth Circuit are reported at 199 F. (2d) 134. They appear in Cross-Appellees' Appendix (at pp. 18-45).

* The record in the Court of Appeals was in appendices to the briefs of the respective parties. Those appendices, filed in this Court, are designated respectively "Ship Appendix," "Cargo Appendix," and "Appendix for Cosmopolitan Shipping Co. Inc. and A/S J. Ludwig Mowinckels Rederi, Cross-Appellees."

Jurisdiction.

The judgment of the Court of Appeals for the Fourth Circuit was filed on September 22, 1952. A motion for reargument was denied and order entered directing the issuance of mandate on October 31, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Statement.

Your petitioners were the owners or subrogated underwriters of general cargo laden on the Norwegian S. S. "Ocean Liberty" at New York for carriage to Antwerp and Havre. The vessel was under charter to respondent, A/S. J. Ludwig Mowinckels Rederi (hereinafter described as Mowinckels), who put her on berth as a common carrier. Respondent, Cosmopolitan Shipping Co., Inc. (hereinafter described as Cosmopolitan) was Mowinckels' U. S. general agent. Bills of lading were issued at New York on behalf of Mowinckels by Cosmopolitan covering all of the cargo which this litigation concerns.

At Baltimore, a prior port of loading, the #3 hold of the "Ocean Liberty" had been filled with 30,480 paper bags of fertilizer grade ammonium nitrate (throughout this litigation and hereinafter described as Fgan) weighing 1389 long tons. This commodity, when stowed in a smaller mass in a hold of the French S. S. "Grand Camp" at Texas City, Texas, some two months before, had ignited spontaneously and thereafter exploded, completely obliterating the vessel, destroying piers, many large industrial establishments and houses in that city, and

killing some 600 persons. This disaster immediately received great publicity both in this country and abroad. Litigation involving the liability of the United States as manufacturer of this dangerous commodity is now awaiting argument before this Court, a petition for certiorari having been granted on November 10, 1952, in *Dalehite et al.* v. *U. S.*, Docket #308.

The "Ocean Liberty" sailed from New York for Antwerp on July 11, 1947, but on Mowinckels' order she put in at Brest, France, on July 23rd, where she commenced discharging her cargo. Five days later, on July 28th, a spontaneous fire broke out in the Fgan filling the vessel's #3 hold. The fire developed very rapidly and was communicated to the shed of the pier where the vessel was tied up. Much of the cargo which had been discharged from the vessel to the pier was destroyed or damaged by the fire on shore. Later, the burning vessel was towed as far out in the harbor as the depth of water permitted, where a terrific explosion destroyed her, all of the cargo remaining on board, and certain shore structures; and killed a number of persons on shore.

The District Court found that the spontaneous ignition of the Fgan stowed in the #3 hold of the "Ocean Liberty" resulted from its negligent stowage; and that Mowinckels, as contracting carrier, was liable for all the losses suffered by your petitioners because the fire was caused by Mowinckels' "actual fault or privity" (Finding 26, Ship App. 41-2; Finding 28, Ship App. 43-4; Opinion of D. C., Ship App. 49-53) within the meaning of the fire exception of the

Carriage of Goods by Sea Act (U. S. C. Title 46, sec. 1304 (2) (b)).*

It held that Cosmopolitan was not a contracting carrier and that it was not liable as a tort feasor as its negligence was by reason of non-feasance; and that, moreover, the pleadings did not set out a claim against Cosmopolitan based on tort.

The Court of Appeals for the Fourth Circuit accepted all the findings of fact of the District Court. Although affirming the finding that the disaster resulted from spontaneous ignition of the Fgan stowed in the vessel's #3 hold and that the ignition was caused by the manner of its stowage, two of the judges concluded that the stowage was not negligent or, in any event, that Mowinckels' "actual fault or privity" under the Carriage of Goods by Sea Act had not been established. The dissenting judge held with the District Judge that application of the usually accepted measure of negligence established Mowinckels' liability under the Act.

While the Carriage of Goods by Sea Act by its own terms (Sec. 1301 (e))** governs rights between

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* U. S. C. Title 46, sec. 1304:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * *

"(b) Fire, unless caused by the actual fault or privity of the carrier; * * *."

** U. S. C. Title 46:

"Section 1301. When used in this Act—

* * * *

(e) The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

cargo owner and carrier only while cargo is waterborne, the Court of Appeals made no distinction between Mowinckels' liability for damage to the cargo on the vessel and to the cargo on shore.

The Court of Appeals did not pass upon the question of Cosmopolitan's liability as a tort feasor.

THE QUESTIONS PRESENTED.

I. When cargo of a type which inherently presents a known danger of terrible disaster is accepted by an ocean carrier for transportation, is not that carrier obligated to exercise care commensurate with the known danger? Is not "the actual fault or privity of the carrier" within the meaning of the Carriage of Goods by Sea Act, to be measured by the rule which governs negligence in other cases?

The Texas City disaster which horrified the world established in the most ghastly way that there was great danger of terrible disaster if Fgan ignited. When Fgan was offered to Cosmopolitan for carriage on the "Ocean Liberty", about two months after the Texas City disaster, it cabled Mowinckels asking instructions as to whether or not this cargo should be carried (Finding 25, Ship App. 40). Upon Mowinckels cabling approval of its carriage, Cosmopolitan's only remaining interest was to ascertain if the Texas City disaster had led to any governmental prohibition of the carriage of Fgan (Finding 26, Ship App. 42) or if it had led to any requirement which would cause extra expense in handling it. That was the testimony of Cosmopolitan's Operations Manager (Cargo App. 84). Having satisfied himself

on these two points, he ordered the stowage of Fgan on the "Ocean Liberty".

Long before stowage of the Fgan on the "Ocean Liberty", there was extant a mass of recognized authorities warning of the danger of spontaneous ignition of ammonium nitrate when in contact with carbonaceous matter and stowed in a large mass (Finding 20, Ship App. 34-6; Finding 23, Ship App. 28-9; Finding 26, Ship App. 41-2). Fgan is ammonium nitrate the particles of which have been covered with carbonaceous matter (Finding 19, Ship App. 34); and, of course, the paper bags in which it is packed are carbonaceous.

It is inevitable that paper bags will become torn during stowage and during a voyage (Ship App. 261); and thus frayed pieces of paper are bound to become impregnated with Fgan. The wax coating of the particles of Fgan and contact of the particles with any other carbonaceous material such as torn paper, dirt of the hold, etc. increases the danger of spontaneous ignition and explosion.

The fire in Fgan on the "Grand Camp" at Texas City was spontaneous. That was the conclusion of a qualified chemist who made an immediate investigation of that disaster (Cross-Appellees' App. 43); and that was later judicially determined to have been the cause (*In re Texas City Disaster Litigation,* Findings of D. C., unreported; Court of Appeals, 197 F. (2d) 771 at 781; reference to that case in present case, Ship App. 51).

The National Board of Fire Underwriters made an immediate investigation of the Texas City disaster

and it issued its report which was widely circulated, well before the stowage of the Fgan on the "Ocean Liberty". The report commented on the necessity of stowage of Fgan on land in small blocks and for stowage on ships "to allow for circulating of air" (Finding 23, Ship App. 38). Cosmopolitan did not obtain a copy of this report (Finding 24, Ship App. 39).

Although fully informed that the Texas City disaster had resulted from ignition of Fgan stowed on the S. S. "Grand Camp", no representative of Cosmopolitan consulted with any qualified person concerning the dangers inherent in the carriage of Fgan (Finding 26, Ship App. 41-2); and none knew that it might ignite spontaneously if stowed in a large mass with limited ventilation. Cosmopolitan merely instructed Terminal Shipping Co., a Baltimore stevedore who also acted as its agent, to stow Fgan on the "Ocean Liberty"—particularly directing stowage in #3 hold—under the supervision of the Baltimore Coast Guard representative, the Baltimore Fire Department, and the local surveyor of the Board of Underwriters of New York.

No one having anything to do with the stowage of the Fgan on the "Ocean Liberty" or its supervision had any chemical experience and none knew that this commodity presented the danger of spontaneous ignition (Finding 26, Ship App. 40-1).

The #3 hold of the "Ocean Liberty" was the hottest hold of the vessel. The 30,480 paper bags of Fgan stowed in that hold were packed together as tightly as it was possible to get them (Ship App. 144, 188), without any break in the stow; and the solid block of

bags some 54′ by 47′ by 23′ was completely encased in heavy paper (Finding 26, Ship App. 40-41; Finding 27, Ship App. 42-43).

As stowed, not only was ventilation of the interior of the mass of Fgan inhibited but there was no ventilation even of the exterior (Opinion of Ct. of App., Cross-Appellees' App. 20-21).

At New York, where your petitioners' cargo was stowed on the vessel, Cosmopolitan's own officers became familiar with how the Fgan had been stowed at Baltimore (Stowage plan, Ship App. 719; Cargo App. 91-93, 107, 114-116, 129). Because of their ignorance of the danger of spontaneous ignition, they increased the danger of disaster: while, after stowage of the Fgan at Baltimore had been concluded, ventilation could at least reach the #3 hold from the weather-deck hatch through the tween deck, at New York tarpaulins were placed over the hatchboards of the hatch serving the #3 hold; the #3 tween deck was filled with cargo; the weather-deck hatch was tightly battened down and covered with deck cargo (Cargo App. 95, 115-117).

With potential disaster below decks, the "Ocean Liberty" was ordered by Cosmopolitan to sail on a Trans-Atlantic voyage with no warning to the master that any danger was presented by the cargo below decks, and with no possibility of examining the Fgan in the #3 hold to ascertain if it was heating.

In the prevailing opinion of the Court of Appeals the following is set out as the controlling doctrine (Cross-Appellees' App. 35):

> "When the shipment of Fgan was offered to Cosmopolitan, it employed Terminal to do the

> loading and directed it to follow the instructions of the Coast Guard, the Fire Department and the Board of Underwriters. In so doing, Cosmopolitan exercised all the care that could be required of a reasonably prudent man in the premises; and, if there was negligence in the stowage, it was the fault of Terminal, whose negligence would not constitute actual fault or privity on the part of the carrier."

Thus, it is the doctrine of the majority opinion of the Court of Appeals in the present case that an ocean carrier is without "actual fault or privity" within the meaning of the Carriage of Goods by Sea Act, although the following facts are established: knowing that cargo presents danger of terrible disaster if it ignites, the carrier's managing representatives make no inquiry into the ventilation which its characteristics require and they remain ignorant of the danger of spontaneous ignition if ample ventilation is not afforded it—a danger known to those familiar with its characteristics and publicized in literature of the day; they direct that the hottest hold of a vessel be stowed with this dangerous cargo under the supervision of men who are ignorant of the necessity for the amplest ventilation; the vessel is so stowed as to inhibit any ventilation of the dangerous cargo; and the ship and all her cargo are destroyed because insufficient ventilation causes this dangerous cargo to ignite spontaneously and explode.

We find this doctrine shocking. It is in conflict with the basic principles which courts have heretofore applied in measuring negligence; and it provides an ocean carrier with an easy avenue of escape from liability for negligence: the ruling is that in a fire case

an ocean carrier is not liable if it keeps itself ignorant of what is required to obviate a danger, whatever disaster may result from that ignorance.

Surely the proper principle is that set out in the dissenting opinion of the Court of Appeals in the present case (Cross-Appellees' App. 39):

> "Obviously the duty to use due care to inquire into the nature and qualities of Fgan rested heavily upon the owners and agents of the ship who undertook to stow the dangerous material on board while the memory of the Texas calamity was still fresh in the national consciousness. Even under ordinary circumstances, as we have held, a shipowner must use due care to ascertain the characteristics of goods offered for shipment. See *Bank Line* v. *Porter,* 4 Cir., 25 F. 2d 843, 845; *The Nichiyo Maru,* D. C. Md., 14 F. Supp. 727, affirmed 4 Cir., 89 F. 2d 539, 543; *The Richelieu,* 4 Cir., 89 F. 2d 497; *The Ferncliff,* D. C. Md., 22 F. Supp. 728, affirmed 105 F. 2d 1021. But in the present instance, due care rose to the highest degree of diligence to be sure that every reasonable precaution be taken so as to avoid the loss of human life and property, for it had been tragically demonstrated that great danger lurked in the carriage of the substance and that ordinary methods of stowage were not enough. Nothing else would satisfy."

That also was the conclusion of the District Judge (Ship App. 50-51):

> "Due diligence is not an absolute but a relative term to be determined under all the facts and circumstances of the particular case. One very

important circumstance is the knowledge of the very dangerous character of ammonium nitrate in transportation brought so vividly home to the shipping industry by the Texas City disaster."

* * * *

"As the carrier must have known that it was an extremely dangerous commodity to transport, due diligence under the circumstances imposed the duty of making more than ordinary routine or customary general inquiries which might be reasonably sufficient to show due diligence with respect to commodities generally. In view of the very hazardous nature of the Fgan something more was required of the carrier in this case than to rely upon merely general knowledge. It was not due diligence with respect to the safety of the general cargo for the carrier to accept this dangerous commodity without much more particular inquiry than it made in this case. Apparently too great reliance was placed upon the only general supervision of the loading by the local Fire Department, the Coast Guard and the representatives of the New York Board of Underwriters. These representatives were apparently not themselves aware of the danger of spontaneous combustion in the masses of Fgan stored in the lower holds, but the carrier cannot shift its responsibility by reliance upon the ignorance of others not charged with a particular duty."

It is apparent that the majority of the Court of Appeals relied in large part on the decision of this Court in *Consumers Co.* v. *K. K. K.* (*The Venice Maru*), 320 U. S. 249, in support of their conclusion that Mowinckels was without "actual fault or priv-

ity". In that case this Court held that the Fire Statute protects a vessel when sued *in rem* as well as the vessel owner. There, the carrier's general manager, knowing that fish meal was susceptible to spontaneous ignition, engaged a qualified independent surveyor, who also knew of the danger of spontaneous ignition, to arrange the stowage to obviate that danger. During the subsequent voyage the fish meal ignited spontaneously because, due to the negligence of this surveyor, the fish meal was stowed so solidly that insufficient ventilation was afforded it. The carrier's general manager was ignorant of how the vessel was stowed. This Court said (at p. 250):

> "The cause of the fire is found to be negligent stowage of the fish meal, which made the vessel unseaworthy. The negligence was that of a person employed to supervise loading to whom responsibility was properly delegated and who was qualified by experience to perform the work."

Although cargo owners have no representatives on shipboard when fires break out, the established law casts upon them, if they would recover from an ocean carrier for their fire losses, the onerous burden of proving the cause of a fire and that the negligence of a managing representative of the carrier is related to the fire. The decisions in *The Venice Maru* and in other cases establish the doctrine that, contrary to the legal principles applicable in most cases, an ocean carrier may, under the statutory fire exemptions, escape liability for the negligence of a qualified agent it engages to stow or supervise the stowage of cargo, *so long as the negligence of the carrier's managing officers is not involved.*

In the present case Cosmopolitan as Mowinckels' *alter ego,* failed to satisfy the carrier's primary obli-

gation of ascertaining the inherent characteristics of cargo which it knew to be terribly dangerous. The District Court held (Ship App. 49):

> "The actual fault of the carrier in this case was in authorizing the carriage of the ammonium nitrate fertilizer in large quantities in the lower holds of the ship without adequate provision for ventilation, the necessity for which could and should have been learned by the carrier if proper inquiry had been made before accepting the Fgan for carriage. The great importance of such inquiry should have been apparent to the carrier in view of the terrible disaster which had occurred about two months earlier at Texas City, Texas, where a ship then being loaded with Fgan caught fire and exploded with great loss of life and damage to property. This event was a great disaster of nearly world wide importance and especially noteworthy to the shipping industry."

(Ship App. 50):

> "* * * a carrier is charged with the responsibility of making proper inquiry as to the characteristics of the cargo that it accepts. If proper inquiry had been made by the carrier it should have been learned by it not only that very great care and caution should be taken in transporting Fgan, but also that it was under certain conditions susceptible to spontaneous combustion especially if stowed in large masses for a considerable period of time in the hold of a ship without unusually good ventilation."
>
> * * * *
>
> "* * * the acceptance of the large quantity of ammonium nitrate with knowledge of its very

> dangerous character in transportation without the proper inquiry as to the possibility of spontaneous combustion, constituted in my opinion an actual fault of the carrier."

Cosmopolitan directed that the hottest hold of the "Ocean Liberty" be filled with this dangerous cargo. It knew that Terminal Shipping Co., the Baltimore stevedore which it directed to stow the dangerous cargo at Baltimore, had never before handled Fgan (Ship App. 444, 515); nevertheless, Cosmopolitan gave no directions to Terminal to consult with a chemist and ascertain what dangers should be guarded against. Both Cosmopolitan and Terminal remained ignorant of the necessity for ample ventilation of the Fgan to guard against its inherent danger of spontaneous ignition because neither looked into the matter.

As the dissenting judge pointed out, prior to the present case the Court of Appeals for the Fourth Circuit had held in a number of cases which he cited (*supra* at p. 12), that an ocean carrier is obligated to use due care to ascertain the characteristics of cargo offered for shipment. That is still the rule in other circuits.

> *Anderson* v. *Lorentzen,* 160 F. (2d) 173 at p. 175 (C. A. 2);
> *The Willfaro, The Willsolo,* 9 F. (2d) 940 at p. 942 (N. D. of Calif.), affirmed 9 F. (2d) 622 (C. A. 9);
> *The Thomas P. Beal,* 11 F. (2d) 49 at p. 51 (C. A. 3).

In *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro* (*The Pocone*), 159 F. (2d) 661, the Court of Appeals for the Second Circuit considered a vessel

owner's liability for fire damage to cargo under the Fire Statute which exempts an owner unless his personal "design or neglect" is involved. The Court said (at p. 664):

> "As in all such cases, the measure of the duty imposed depends upon the cost or difficulty of the precaution, compared with the hazard and the interest at stake."

(at p. 665):

> "The measure in such cases is not what the owner knows, but what he is charged with finding out. He may, if he will, put his ship at hazard and answer as he can to his underwriters, but to the cargo he must not be indifferent; he is relieved of his absolute liability at common-law only upon condition that he exercises care measured by the occasion."

That Court said that a finding of negligence (p. 665):

> "sets a standard of conduct, which while it is applicable only to the concrete situation, involves a choice between, and an appraisal of, two contrasted values—the needed precaution and the possible damage."
>
> * * * *
>
> "Even so, after the damage has been discounted by the risk, the decision involves a comparison of the contrasted values: the necessary precautions and the stake; and that in turn demands the setting of a standard, a norm, an imperative, * * *."

In *The Richelieu,* 48 F. (2d) 497, the Court of Appeals for the Fourth Circuit, in dealing with a rail

carrier's liability for damage resulting from an explosion of pitch dust held (at p. 501):

> "* * * the contention that the explosibility of pitch dust was not known prior to the explosion on the Richelieu cannot be sustained. Not only was there information available as to explosions which had occurred, with opinions by experts and officials of government departments that pitch dust was explosive, but it also seems to us that, in the absence of such information, the railroad company, with its vast experience as a carrier of commodities, should have known that this cloud of carbonaceous dust was explosive, and that it was dangerous to bring a source of ignition in contact with it. The man on the street may not know the dangerous character of carbonaceous dust, but this carrier knew, or should have known it; * * *."
>
> * * * *
>
> "With the general and common knowledge existent as to the explosive character of carbonaceous dusts in general, and with the information which the railroad might have obtained, and which it should have obtained when it held itself out as qualified to handle pitch, as to the explosibility of pitch dust in particular, there can be no question that it was guilty of negligence * * *."

Information was readily available to anyone interested that Fgan inherently presented the danger of spontaneous ignition. As Cosmopolitan did not satisfy its primary obligation, we submit that delegation of the duty of stowing the vessel to a stevedore, equally ignorant of the danger of spontaneous ignition, does not exempt Mowinckels from liability under the fire exception of the Carriage of Goods by Sea Act.

In *The Venice Maru* this Court said, in relation to the Fire Statute (320 U. S. at 255):

> "It enabled the Carrier to compete by offering a carriage rate that paid for carriage only, without loading it for fire liability. The shipper was free to carry his own fire risk, but if he did not care to do so it was well known that those who made a business of risk-taking would issue him a separate contract of fire insurance. Congress had simply severed the insurance features from the carriage features of sea transport and left the shipper to buy each separately."

This language taken alone would suggest that it is the view of this Court that the Fire Statute provides a vessel owner with an absolute exemption from liability for fire. The prior discussion, however, makes it clear that the Court was referring to fire losses which do not involve the negligence of a vessel owner's own managing representatives. Nevertheless, since the decision in *The Venice Maru,* lower courts have been prone to assume that when cargo is lost as the proximate result of fire, the carrier is not liable.

Fire is the greatest single cause of loss of cargo at sea. While neither the Fire Statute nor the fire exemption of the Carriage of Goods by Sea Act should be applied with a niggardly hand, nevertheless, the conclusion on the established facts of the present case that the carrier was without "actual fault or privity" is in effect a notice to ocean carriers that if they wish to carry dangerous cargo which may ignite, their best policy is to remain ignorant of what may cause ignition, for otherwise they may be obliged to incur additional expense if they would escape liability for subsequent fire losses.

II. Does the fire exception of the Carriage of Goods by Sea Act provide a carrier with an exemption from liability for damage to cargo discharged on shore after an unjustifiable deviation?

The cargo discharged from the "Ocean Liberty" to the pier at Brest, was still in the carrier's custody (Cargo App. 2-3). Much of it was destroyed or damaged while on the pier as the result of the fire spreading from the vessel to the pier before the vessel could be towed away.

Certain cargo which had been carried on the deck of the "Ocean Liberty" in breach of the contracts of carriage providing for under-deck stowage, was thus damaged. While this loss was not causally related to the prior carriage of the cargo on the vessel's deck, we submit that this is irrrelevant to the question of the carrier's liability. Such a breach of contract renders the carrier liable for a deviation.

> *The St. Johns N. F. Shipping Corp.* v. *Companhia Geral, etc.,* 263 U. S. 119 at p. 124.

This Court and other courts have held that after an unjustifiable deviation the carrier is liable as an insurer and that it is irrelevant that there is no causal relationship between the deviation and subsequent loss.

> *The Willdomino,* 272 U. S. 718 at p. 727;
> *The Pelotas,* 66 F. (2d) 75 at p. 77 (C. A. 5);
> *The Sarnia,* 278 Fed. 459 at pp. 463-4 (C. A. 2).

The parties had chosen a case as representative of the shipments where this issue is presented (Ship

App. 596-7). We argued and briefed in the District Court that, without relation to the cause of the fire on the "Ocean Liberty", the carrier cannot escape liability for damage to the cargo carried on deck in breach of the carrier's contracts. The District Court did not feel called upon to discuss this issue as it found that all of your petitioners were entitled to recover because it held that the fire resulted from the carrier's "actual fault or privity".

Erroneously assuming that this issue had not been raised below, the Court of Appeals held that there is nothing in the point anyway. It held (Cross-Appellees' App. 36):

> "Even though stowage on deck of cargo shipped under clean bills of lading constitutes a deviation, this does not deprive the carrier of his right to exoneration under the fire provision of the Carriage of Goods by Sea Act, just as it does not deprive the owner of the protection of the fire statute, unless it was a cause of the fire. See *The Ida* 2 Cir. 75 F. 2d 278, 279; *Globe & Rutgers Fire Ins. Co.* v. *United States* 2 Cir. 105 F. 2d 160, 166; *The Venice Maru* 39 F. Supp. 349, 353; *The Margaret Lykes* 57 F. Supp. 466, 470."

In the cases involving fire damage cited by the Court of Appeals, all decided in the Second Circuit, it has been held that after unjustifiable deviations the vessel owners are entitled to the benefit of the exemption of the Fire Statute in connection with cargo destroyed by fire while on vessels, when it appears that the deviations do not cause the fires. We submit that the decisions and the dicta in these cases

are wrong in principle and in conflict with the decisions of this Court and of the Court of Appeals in other circuits where it has been held that statutory exemptions are not open to a carrier after unjustifiable deviations even though not causally related to subsequent losses.

The Willdomino, 272 U. S. 718—involving the statutory exemption from liability for negligence in navigation contained in the Harter Act (Title 46, U. S. C., sec. 192);

The Pelotas, 66 F. (2d) 75 (C. A. 5)—involving the Harter Act and the statutory limitation of liability under Title 46, U. S. C., sec. 183;

Western Lumber Mfg. Co. v. *U. S.* (*The Brush*), 9 F. (2d) 1004 at p. 1006 (N. D. of Calif.)—involving the Harter Act.

The doctrine of the Court of Appeals in the present case no doubt will be considered authoritative in the Fourth Circuit unless reversed. However, that court was in error in assuming that the question presented is the effect of deviation on a statutory exemption for there is no statutory exemption open to the carrier so far as concerns damage sustained by cargo on shore. By its own terms the Carriage of Goods by Sea Act applies only to cargo while it is waterborne (*supra,* p. 6, Note **).

Although the bills of lading provide that the rights of the parties shall be governed by the Carriage of Goods by Sea Act even after the cargo has been discharged from the vessel (Cargo App. 2), this incorporation merely makes the Act a provision of the contract. It has been held by this Court and other courts that after an unjustifiable deviation the carrier

is not entitled to rely upon any of the bill of lading contractual exceptions.

> *St. Johns N. F. Shipping Corp.* v. *Companhia Geral, etc.*, 263 U. S. 119 at p. 124;
> *The Balto*, 282 Fed. 235 at p. 237 (C. A. 2);
> *The Sarnia*, 278 Fed. 459 at p. 463 (C. A. 2);
> *Pacific Coast Co.* v. *Yukon Independent Tr. Co.*, 155 Fed. 29 at p. 37 (C. A. 9).

Of course liability for damage to the cargo now under consideration is not dependent upon proof that the fire resulted from negligence.

As it was Cosmopolitan which improperly stowed this cargo on deck at New York after issuing clean bills of lading therefor, its liability is equal to that of its principal, Mowinckels.

ADDITIONAL QUESTIONS TO BE URGED IF THE PETITION IS GRANTED.

III. Is not an ocean carrier's liability for fire damage on shore to be measured by a different rule from that applicable to fire damage on shipboard?

Many shipments of cargo in relation to which no question of deviation is presented, were destroyed or damaged on the pier at Brest after discharge from the "Ocean Liberty" but while still in the carrier's custody. We have pointed out that the Carriage of Goods by Sea Act only applies while cargo is waterborne.

The Court of Appeals measured the carrier's liability for the destruction of the cargo on shore by the

rule it applied to liability for loss of the cargo on the ship. In this we submit it was in error for there is no issue as to "the actual fault or privity of the carrier" so far as concerns destruction of cargo on shore. Mowinckels cannot, as a common carrier, by reliance upon the Carriage of Goods by Sea Act as a contractual provision, avoid liability for damage resulting from the negligence of any of its agents or servants, however humble.

IV. Is not an agent of an ocean carrier liable for damage resulting from the negligence of its sub-agents and servants?

The Court of Appeals did not deal with the liability of Cosmopolitan as a tort feasor, presumably because it held that the stowage of the "Ocean Liberty" was not negligent. If this Court holds that application of a proper measure of negligence establishes that the fire on the "Ocean Liberty" resulted from improper stowage of the Fgan, we submit that Cosmopolitan is liable for all of petitioners' losses by application of the rule of *respondeat superior*.

We have pointed out that Cosmopolitan's own officers as well as Terminal, which had been Cosmopolitan's agent at Baltimore for 25 years (Cargo App. 3-5), were negligent in the stowage of the "Ocean Liberty".

The District Court held as a matter of law that your petitioners are not entitled to sue Cosmopolitan both as principal and agent in one suit (Ship App. 54). We submit that the law has progressed beyond this formalistic concept.

Ore S. S. Corp. v. *Hassel,* 137 F. (2d) 326 at p. 330 (C. A. 2);
The Jungshoved, 272 Fed. 122 (S. D. N. Y.);
Cobb v. *Knapp,* 71 N. Y. 348 at p. 353;
Melnick Bldg. & Loan Assn. v. *Melnick,* 64 A. (2d) 773, 361 Pa. 328 at p. 334.

As your petitioners' cargo was lost by fire, the main issue of the case from the start was whether the fire resulted from Cosmopolitan's negligence which was, *ipso facto,* that of Mowinckels, as the former was the *alter ego* of the latter. Nearly all the evidence at the trial related to Cosmopolitan's negligence.

In admiralty there is no distinction between contract and tort and there is no such thing as variance. When the evidence is concluded, judgment is entered against a respondent according to the evidence and the law.

Dupont v. *Vance,* 19 Howard 162;
The Gazelle and Cargo, 128 U. S. 474 at p. 487;
Smith, Kirkpatrick & Co. v. *Colombian S. S. Co., Inc.,* 88 F. (2d) 392 at p. 395 (C. A. 5);
O'Connor, Harrison & Co. v. *Klingel,* 16 F. (2d) 460 (C. A. 9);
Perth Amboy No. 1 and 18 Barges, 1934 A. M. C. 152 at p. 153 (S. D. N. Y.).

The District Court held (Ship App. 56) that Cosmopolitan

> "was not guilty of an affirmative act of negligence in the stowage;"

It was guilty of a

> "mere non-feasance and not a misfeasance or mal-feasance in the performance of its duty."

The Court held that Cosmopolitan, as a tort feasor, may not be held liable for mere non-feasance.

Knowing that Fgan was dangerous but without investigation of its characteristics, Cosmopolitan directed its agent at Baltimore to stow Fgan in #3 hold of the "Ocean Liberty" (Cargo App. 219; Ship App. 133); its agent stowed 30,480 paper bags of Fgan as tightly together as possible in the #3 hold. At New York, Cosmopolitan's own employees made fast tarpaulins over the hatchboards above the #3 hold; filled the #3 tween deck with cargo; battened down the #3 weather deck hatch, and covered that hatch with cargo. The action which Cosmopolitan's employees took at New York necessarily increased the danger of spontaneous combustion of the Fgan in the #3 hold.

At New York Cosmopolitan stowed all of your petitioners' cargo on the "Ocean Liberty" already made unseaworthy by the negligent stowage at Baltimore.

An agent who is in possession and control, either directly or through a sub-agent, of the property of others, owes a duty of care with respect to that property, not only to his principal, but also to the owners of the property. Any act or omission which breaches that duty and causes harm to the property is misfeasance, for which the agent is liable in tort to those whose property he has damaged. It is fundamental that any person, whether or not he is acting in a representative capacity, must manage that which he controls so as not to damage the person or property of others by his negligence.

Chiarello Bros. Co. v. *Pederson,* 242 Fed. 482 (C. A. 2);
Quinn v. *Southgate Nelson Corp.,* 121 F. (2d) 190 (C. A. 2);
Fox West Coast Agency Corp. v. *Forsythe,* 131 F. (2d) 629 (C. A. 9);
Landreth v. *Phillips Petroleum Co.,* 74 F. Supp. 801 (W. D. Mo.);
Consolidated Gas Co. v. *Connor,* 114 Md. 140, 78 A. 725;
Mollino v. *Ogden & Clarkson Corp.,* 243 N. Y. 450;
Margulies v. *Denner,* 185 N. Y. Misc. 139, 56 N. Y. S. (2d) 856, aff'd 297 N. Y. 562;
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Employers Fire Ins. Co. v. *United Parcel Service of Cincinnati, Inc.,* 99 N. E. (2d) 794 (Ct. of App. of Ohio).

Reasons for Allowance of the Writ.

1. The rule which the Court of Appeals adopted by which to measure negligence is shocking in its implication and is contrary to the basic rule by which negligence has heretofore been measured in American courts.

2. It is in conflict with the established rule in other circuits when measuring the negligence of ocean carriers and is in conflict with the rule of the Fourth Circuit itself when measuring the negligence of a rail carrier.

3. The rule that Mowinckels was without "actual fault or privity" within the meaning of the fire excep-

tion of the Carriage of Goods by Sea Act on the facts found to be established, is in conflict with the rule in other circuits.

4. The doctrine should not be countenanced in our courts that by remaining ignorant of the characteristics of cargo it knows to be dangerous, an ocean carrier is entitled to escape liability under the fire exception of the Carriage of Goods by Sea Act for the destruction of cargo caused by spontaneous ignition and subsequent explosion of the known dangerous cargo, directly resulting from the manner of its stowage.

5. Fire is the greatest single cause of loss of cargo at sea. As new types of cargo presenting increased danger of fire are being increasingly offered for ocean carriage, the number of disasters at sea by fire is expanding. The time is ripe for a ruling by this Court that if an ocean carrier wishes to transport dangerous cargo, he must bestir himself and see that it receives the care which its dangerous characteristics demand.

6. The rule that a carrier is exempt from liability under the fire exception of the Carriage of Goods by Sea Act for fire damage sustained by cargo discharged on shore after an unjustifiable deviation, is in conflict with the rule in this Court and in other circuits.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Fourth Circuit, commanding that court to certify and to send to this Court for its review and determination on a date certain to be therein named, a full and complete

transcript of the record and all proceedings of the case entitled on its docket: A/S J. Ludwig Mowinckels Rederi, Appellant, and Cosmopolitan Shipping Co., Inc. and A/S J. Ludwig Mowinckels Rederi, Cross-Appellants, v. Accinanto, Ltd., *et al.*, Appellees and Cross-Appellants; Docket No. 6385; and that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just.

Respectfully submitted,

HENRY N. LONGLEY,
GEORGE W. P. WHIP,
Attorneys for Petitioners.

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JAN 7 1953
HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1952

No. 506

ACCINANTO LTD., ET AL.,

Petitioners,

vs.

A/S J. LUDWIG MOWINCKELS REDERI and COSMOPOLITAN SHIPPING COMPANY, INC.,

Respondents.

BRIEF SUBMITTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

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Supreme Court of the United States

OCTOBER TERM, 1952

ACCINANTO LTD., et al., Petitioners, vs. A/S J. LUDWIG MOWINCKELS REDERI and COSMOPOLITAN SHIPPING COMPANY, INC., Respondents.	No. 506

BRIEF SUBMITTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

Proceedings Below

Petitioners are cargo underwriters, consignees, etc., suing to recover for loss or damage to cargo shipped on board the S.S. Ocean Liberty, which was destroyed by fire and ensuing explosion at Brest, France, on July 28, 1947 (R. 21, 22).*

Respondent, A/S J. Ludwig Mowinckels Rederi, a Norwegian corporation, was the time charterer of the Ocean Liberty, of the well-known "Liberty" type built in the U. S. A. in 1943 (A. 598).

Cosmopolitan Shipping Company, Inc., the other respondent, with offices in New York, was the New York agent

* Numbers preceded by "R." refer to the pages of Vol. 4 of the printed record, the proceedings in the Court of Appeals. Numbers preceded by "A." refer to pages of Vols. I and II, the "Ship Appendix." "Nitrate" or "ammonium nitrate" when used herein mean "ammonium nitrate, fertilizer grade", sometimes called "Fgan".

of Mowinckels Rederi. It had no office in Baltimore and none of its employees was present when the Ocean Liberty was loaded there.

The libel alleges two causes of action; *first*, for non-delivery of merchandise, against Mowinckels Rederi and Cosmopolitan Shipping as joint carriers (A. 2); *second*, for deviation in that the Ocean Liberty called at Brest because of a strike at Antwerp (A. 4).

Prior to the trial, proctors for libellants discontinued a suit to recover $345,000 for the loss of the nitrate (A. 44) evidently because of the realization of their clients that the claim of bad stowage was without merit.

The assertion that Cosmopolitan Shipping Company, Inc., was a carrier of the merchandise broke down and was abandoned. Libellants shifted their ground at the trial, and sought to sustain a cause of action against Cosmopolitan Shipping Company on the ground of the latter's negligence, *despite the absence of any assertion of negligence in the libels.*

The District Court resolved the controversy as follows:

(1) The libels against Cosmopolitan Shipping Company, Inc., were dismissed (A. 76).

(2) The causes of action based on the theory of deviation were also dismissed (A. 76).

(3) An interlocutory decree in favor of libellants and against Mowinckels Rederi was entered (A. 76) on a theory of "constructive" fault on the part of Mowinckels in the face of the admission of libellants' counsel that "one cannot overlook the fact that Mowinckels is in Norway and presumably knew nothing of the way this ship was stowed" (A. 399).

Both parties appealed to the Court of Appeals which reversed the interlocutory decree in favor of libellants, directed a dismissal of the libels and affirmed the decision below in all other respects (R. 36).

Petitioners then moved for a rehearing and for an amendment of the Court of Appeals opinion (without specifying the amendment desired). This motion was denied (R. 70, 71).

The case at bar is of interest only to the parties; there are no "special and important" reasons why a writ of certiorari should be granted (Rule 38(5)).

The Court of Appeals decided this cause adversely to petitioners on the ground that they had not shown negligence in stowage, saying:

> "We do not think, however, that there is adequate support for the finding that there was negligence in the stowage of the Fgan or for holding Mowinckels liable because of such stowage. In the first place, we do not think that in the light of knowledge existing at the time it can be said that there was negligence or lack of ordinary care in the stowage. * * * Even they [Petitioners' experts] do not say that at the time of the loading of the Ocean Liberty there was any scientific teaching to the effect that Fgan was likely to heat because of its wax coating or that it was dangerous to stow it in paper bags, or that it was customary to give it any greater ventilation than other bagged cargo" (R. 22, 23).
>
> " * * * Surely they [the stevedores and carrier] are not to be held negligent when they seek and follow the advice of expert and experienced agencies such as the Coast Guard, the Fire Department and the Board of Underwriters, instead of mapping out rules of their own based upon consultation with academic experts" (R. 28).

Again at R. 29:

> "It would not be reasonable to hold the carrier or the stevedore chargeable with knowledge that this expert committee [the Interagency Committee, appointed by the Secretary of the Treasury 'to study every possible hazardous aspect of ammonium nitrate' (R. 28)] did not have or with reaching conclusions that it did not reach after careful study, or with negligence in not adopting safety measures that the committee did not so much as suggest."

This case cannot be a controlling precedent as respects any other. All that was decided was the issue of due care in the light of particular facts. There is no conflict with any decision in another circuit nor with applicable local law.

Facts

The facts are summarized by the Court of Appeals (R. 18-29), and are restated here because of the distorted impression created by the many incorrect and misleading statements in the petition. The more serious errors and omissions are specifically commented on, infra Point III, pp. 16-27.

Relevant Dates

The Ocean Liberty arrived at Baltimore on Saturday, June 28, 1947 (A. 28).

The holds in which she was to load the nitrate were examined by a lieutenant of the United States Coast Guard, Battalion Chief Trenner of the Baltimore Fire Department and Captain Carter, surveyor to the New York Board of Underwriters (A. 212). After washing, cleaning and approval of these holds, loading commenced on June 30, the nitrate being stowed in lower holds 1, 3 and 5 (A. 212, 329).

The Ocean Liberty, having loaded her Baltimore cargo, left for New York on July 5 (A. 29).

At New York further cargo was loaded, and she sailed from New York on July 11 (A. 30).

On July 23, she arrived at Brest and began to discharge on the next day (A. 534).

Discharging continued normally until 12:30 P. M. Monday, July 28, 1947, at which time slight smoke was noticed emerging from a starboard ventilator which served holds 2 and 3 and was situated between them (A. 523, 524, 525).

The Brest Fire Department was promptly notified, and measures were taken to extinguish the fire which, however, increased in intensity (A. 537-539). As the fire could not

be controlled, the Ocean Liberty was towed by French government tugs into the outer harbor, where she grounded (A. 541-542).

A French naval vessel thereupon cannonaded the hull of the ship apparently in order to blow a hole in her side so that her holds might be flooded (A. 544). At about 5.35 P. M., after having been on fire for five hours, the ship exploded (A. 546).

Loading Precautions

Because of the fire and explosion on the Grand Camp at Texas City on April 16, 1947, the loading and stowage of the Ocean Liberty at Baltimore were kept under the constant supervision and control of the Coast Guard, Fire Department and Board of Underwriters (A. 29).

In particular, the following precautions were strictly observed:

(1) Before loading, the compartments in which the nitrate was loaded were thoroughly cleaned (A. 212, 328, 329).

(2) No other cargo was loaded in the same compartments with the nitrate (A. 213, 29, 30).

(3) No bags were loaded at a temperature exceeding 100° F. (A. 29; R. 24).

(4) The bags were loaded directly into the ship from the railroad cars so as to avoid any risk of contamination (A. 270).

(5) The utmost care was taken to avoid loading any broken bags (A. 185, 186) and to sweep up any nitrate that might escape from the bags (A. 184).

(6) No smoking was allowed (A. 331).

(7) A fire hose was kept on deck running at all times and a special fire watch employed (A. 170).

Ventilation and "Bag on Bag" Stowage

The nitrate bags were stowed by the "bag on bag" method (A. 191). Schmidt, a practical stevedore of long experience, called by libellant-petitioners, testified that this was the best method of stowing paper bags and allowed ventilation in the spaces between the ends of the bags (A. 155). Mieskowski, a stevedore of equal qualifications, also called by libellants, agreed with Schmidt's testimony (A. 183). When the Liberty ship, Henry T. Scott, was loaded with nitrate near New Orleans in May, 1947, the nitrate was stowed in the same way, and Mr. G. S. Scott, a chemist, who took temperatures in the stow on behalf of the United States Bureau of Mines, testified that, as the bags were rounded at the ends, there was a channel in between each one (A. 409) and also that, as the temperatures taken by him in the stow reflected the fluctuations in the open air temperature, ventilation was taking place (A. 409).

Air Spaces at Top, Bottom and on All Four Sides of the Stow

There was a space of about 2½ to 3 feet between the top of the bags and the deck beams (A. 339). Any warm air would rise into this space and be blown out through one or more of the four ample-sized ventilators (A. 335, 466) which served this hold (A. 599).

On each side of the hold there were fitted batten boards as customary, so that the bags did not rest against the side or "skin" of the ship. There was a space of about 1′ 2″ between the batten boards and the "skin" in which space air could freely circulate (A. 587).

At the fore and aft bulkheads of the hold were so-called "stiffeners", i.e., vertical steel beams which strengthened the bulkheads. The distances between the bulkhead and the outer edge of these "stiffeners" was 1′ 3″ (A. 586); this

space of 1′ 3″ (at each end) allowed ventilation fore and aft of the bags.

Under the bags was a double layer of dunnage (planks about 2 inches thick). These planks were laid with interstices between them, allowing ventilation underneath the bags (A. 339).

The lower hold in which the nitrate was stowed was, of course, below the water-line. It was thus cooled by the sea water outside the hull and was protected from the heat of the sun by the 'tween deck space and the cargo stowed therein (A. 465).

Temperatures taken in ammonium nitrate stowed on the Liberty type ship, Henry T. Scott (substantially a sister ship), showed that lower hold No. 3 was cooler than the outside air (A. 629).

FIRST POINT

The Ocean Liberty was loaded and stowed without negligence on the part of anyone.

The expert witnesses as to the propriety of the stowage can be divided into two classes:

(1) Witnesses well acquainted with problems of stowage, including ventilation of cargo;

(2) Chemists unacquainted with stowage.

(1) The testimony of all the qualified witnesses in the first class fully approved the stowage of the Ocean Liberty; no one condemned it. Libellants called no qualified witnesses to testify that the stowage should have been different.

Some of those who approved the stowage are:

Carter, chief Baltimore surveyor to the Board of Underwriters of New York (A. 208). Captain Carter had studied literature on the subject, had consulted Mr. McKenna, chief

chemist for the Association of American Railroads (A. 233) and Captain Parker, Chief Surveyor of the Board of Underwriters at New York (A. 266); and had attended a meeting called to discuss the loading and stowage of Fgan by the Baltimore & Ohio R. R. on May 22, at which were present railroad representatives, steamship representatives and chemists from the Association of American Railroads (A. 247, 270).

Blanchard, Superintendent of the United States Lines Company, graduate of the University of Glasgow with a Bachelor of Science degree, who had consulted a leading firm of Baltimore chemists on the carriage of Fgan (A. 274, 275).

Carroll (A. 317), steamship agent and stevedore.

Weglein, Baltimore surveyor to the Board of Underwriters under Captain Carter (A. 327, 331, 335); he testified specifically that the stowage fully complied with the rules of the Board of Underwriters (A. 331).

Neilson (A. 432), stevedore superintendent, who loaded a number of vessels with Fgan at United States Gulf ports both before and after the Ocean Liberty.

Schmidt and Mieskowski of Terminal Shipping Co., referred to *supra*, page 6.

Trenner, Battalion Chief of the Fire Department in charge of Fire Prevention (A. 101). Chief Trenner testified that the Fire Department had issued regulations as to storage and stowage of Fgan (A. 108) which were the same as those recommended by the National Board of Fire Underwriters (Liblt.'s Ex. 1; A. 612); that "at no time" did he find any treatment of the Fgan in the stowage that was against any regulations or against any instructions or against what he thought was proper practice (A. 128).

The stowage complied with all rules and regulations of the U. S. Coast Guard, Board of Underwriters of New York, National Board of Fire Underwriters and Baltimore Fire Department (R. 27).

(2) Testimony of chemists unacquainted with stowage.

Mr. Scott, who was with the Bureau of Mines, specializing in gaseous explosions research (A. 400) was the best qualified expert. He had had experience of 400 cases of spontaneous ignition in coal (A. 413). After the explosion of the Grandcamp, some undamaged bags of nitrate were collected and sent to the Bureau of Mines (A. 693), and Scott took part in experiments made with respect to them (A. 413).

Mr. Scott and Mr. Burns were in charge of the large-scale experiment made on the S.S. Henry T. Scott which loaded a full cargo of Fgan at New Orleans in May, 1947 (A. 400). Their instructions were to install thermocouples throughout the cargo and determine if there was any "spontaneous heating". Their report states that no spontaneous heating could be observed (A. 629, 665).

Still later Scott prepared a resume of all available publications on Fgan; his compendium was issued by the Bureau of Mines and is at A. 645-683; he consulted and abstracted no less than 115 publications on the subject (A. 683).

He testified that the investigations made disproved the possibility of self-heating of Fgan when stowed under ordinary conditions, as in the case at bar (A. 417, 418).

Dr. Kistiakowsky, libellants' leading expert, when under retainer by the Monsanto Chemical Co., visited their plant at Texas City soon after the explosion and was "briefed" with the "facts", among which was the *absolutely false* assertion that some of the nitrate was "so hot that longshoremen had to use *asbestos gloves* to put it on the ship" (italics ours; A. 381).

The testimony as to the heat of the bags is directly to the contrary and is that the Texas City longshoremen wore no gloves at all (A. 479); no bags were more than slightly warm (A. 499).

Dr. Kistiakowsky was misguided by this definitely false premise that the bags were so hot that they had to be handled with "asbestos gloves".

Two years later, Dr. Kistiakowsky experimented with an unexploded portion of the Fgan which had been in a warehouse at Texas City in April, 1947 (A. 351). In the two-year interval, due to changes in humidity, etc., the paper bagging doubtless became impregnated with nitrate.

In laboratory experiments, with an area of contact between the Fgan and the paper, *twenty-five times* as great as was the case when the Fgan was packaged in the usual way (A. 371), Dr. Kistiakowsky found that *there was no self-heating so long as the temperature was not raised above 190° F.* But when he raised the temperature to 200° F. a fire due to self-heating resulted (A. 354).

The District Court found, and this finding was confirmed on appeal, that the temperature of the nitrate loaded on the Ocean Liberty was not more than 100° F. (A. 29; R. 24).

The temperature of the Fgan on the Ocean Liberty was therefore, even on the basis of these laboratory experiments, 100° too low for self-heating to be initiated.

The Interagency Report, which was issued on August 20, 1947 (R. 28), stated that:

> "Limited tests and experience indicate that ammonium nitrate fertilizer of the type involved in the Texas City disaster stowed as cargo in holds of ships, does not heat spontaneously when the temperature of the fertilizer at the time of loading does not exceed 140 degrees Fahrenheit" (A. 696).

Dr. Kistiakowsky said he would accept this (A. 393-4). He also testified that he considered the Henry T. Scott well ventilated (A. 392). The Ocean Liberty was stowed in the same way.

Dr. Kistiakowsky was not asked any hypothetical question based on the actual facts relating to the loading and stowage of the Ocean Liberty. It is obvious that, if such a question had been put to him, he would have answered that self-heating could not be the explanation and that no negligence on anyone's part was involved.

The above facts clearly show an absence of negligence on the part of anyone connected with the loading or stowage of the Ocean Liberty.

It is obvious, of course, that the issue of negligence *vel non* must be judged according to the existing state of knowledge at the time.

The Titania, 19 Fed. 101, 107;
The Cabo Hatteras, 5 F. Supp. 725, 734;
Boston Ins. Co. v. *Metro. Redwood Co.,* 197 Fed. 703, C. C. A. 9;
F. O. Bradley & Sons, Ltd. v. *Fed. Stm. Nav. Co.* [House of Lords], 137 Law Times Rep. 266;
The Australian Star, 67 Lloyd's List L. R. 110.

According to the existing state of knowledge in July, 1947, ammonium nitrate, fertilizer grade, was not known to be self-heating when stowed under the conditions prevailing on the Ocean Liberty; it is not known to be self-heating today (R. 24).

It has been claimed that an inquiry made of a competent chemist would have disclosed that Fgan was self-heating, with the result that "rice ventilators" would have been used.

Mr. Wise, Sr., President of Terminal Shipping Co., attended a meeting at Baltimore addressed by a chemist, but nothing was said thereat about risk of spontaneous combustion (R. 27).

Chemists were consulted by Captain Carter, Baltimore Surveyor of the Board of Underwriters (A. 233), and by Captain Blanchard of the United States Lines (A. 280, 281). Neither was informed that Fgan was self-heating.

Mr. Wise, Sr., died before the trial (A. 84), and it does not appear if he pursued his inquiry further. If he had obtained Circular No. 719 of the United States Department of Agriculture (A. 722), he would have read therein that self-heating in Fgan was not to be feared (A. 741, 742). In a publication of the Bureau of Mines, published May 21, 1947, it was stated that Fgan packed in the ordinary type

of paper bag at 199° F. did not heat further (A. 666, referring to Note 56 at A. 677). When the temperature was raised to 302° F. there was spontaneous ignition in 5 or 6 hours (A. 666).

The stowage of the Ocean Liberty was under the supervision and control of the Coast Guard, Fire Department and Board of Underwriters. They all approved it; no more skilled experts could have been picked.

By 46 U. S. C. § 170(7)(a), the Coast Guard is required to

> "Establish regulations with respect to the * * * stowage * * * of * * * dangerous articles or substances."

By Sub-paragraph (b):

> "The * * * stowage * * * of such dangerous articles or substances shall be in accordance with the regulations so established, which shall * * * be binding" (upon all parties concerned).

Having stowed the Ocean Liberty in accordance with the regulations and with the approval of public officers (Coast Guard) charged with a duty in the premises, fault cannot be imputed to the respondents.

> *Panama Mail S.S. Co.* v. *Davis,* 79 F. (2d) 430, C. C. A. 3;
> *The Annie Faxon,* 75 Fed. 312, 315, C. C. A. 9;
> *The South Coast,* 71 F. (2d) 891, 894, C. C. A. 9;
> *Ryan* v. *Feeney & Sheehan Bldg. Co.,* 239 N. Y. 43, 47.

There was no negligence with respect to the stowage because there was used

> "the degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercise under like circumstances."
>
> (*Canad. Nor. Ry.* v. *Senske,* 201 Fed. 637, 644, C. C. A. 8.)

Waddell v. *A. Guthrie Co.*, 45 F. (2d) 977, 979, C. C. A. 10;
Shankweiler v. *B. & O. Ry.*, 148 Fed. 195, 197-8, C. C. A. 6.

The Ocean Liberty was stowed like all of the other ships carrying ammonium nitrate (R. 20).

SECOND POINT

It is "established law" that cargo interests are subject to "the onerous burden of proving the cause of a fire and that the negligence of a managing representative of the carrier is related to the fire" (admitted in Petition, p. 14). This "onerous burden" was not sustained.

Petitioners' admission is supported by the following authorities, among others:

American Tobacco Co. v. *Katingo Hadjipatera,* 194 F. (2d) 449, C. A. 2;
The Strathdon, 89 Fed. 374, aff'd 101 Fed. 600, C. C. A. 2;
Hoskyn & Co. v. *Silver Line, Ltd.*, 143 F. (2d) 462, C. C. A. 2.

The origin and cause of the fire in the case at bar is necessarily a guess.

All that is known is that smoke was seen coming out of a ventilator between holds 2 and 3; this ventilator was connected with four different compartments—lower holds 2 and 3 and the like-numbered 'tween deck spaces. Fire initiated in any of these spaces might have been later communicated to lower hold 3.

Even if the fire began in lower hold 3, it does not follow that it resulted from spontaneous combustion of the nitrate.

The fire might have been accidentally introduced from outside through the ventilators or the mast house. Fires set by malicious persons are not uncommon. There are other possibilities.

The theory which petitioners seek to sustain is that 1381 tons of Fgan (R. 20) in No. 3 lower hold increased gradually in heat from 100° F. (R. 24) on July 5 to the ignition point of over 302° F. (A. 666) on July 28.

If ignition had occurred in this way, the nitrate in No. 3 hold must have been at a temperature of about 250° F. for several days and at approximately 300° F. on the day of the fire. Noisome fumes would have been emitted (A. 271) and the extreme heat could not have escaped notice of those on board.

Nevertheless, the evidence is undisputed that everything was normal until 12.30 P. M. on July 28, just after Bois made his round of the ship (A. 524, 582).

On July 28, stevedores were working in holds 2 and 4 from 6 A. M. until the fire broke out at 12.30 P. M. (A. 522, 523). It is inconceivable that men working in No. 2 separated from No. 3 only by a thin partition, would not have noticed a temperature of 300° F. in 1381 tons of nitrate in the adjoining hold and that heat and fumes would not have affected the men just outside No. 3 working on the deck (A. 523).

The fact that no heat or fumes were noticed prior to the actual outbreak of fire conclusively shows that the fire could not have resulted from mass heating of the nitrate as contended by petitioners.

A far more likely cause is the accidental introduction of fire through a ventilator on the morning of July 28 when two very heavy half hulls of barges were being discharged from the deck by the use of an "enormous crane" belonging to the French navy (A. 523).

Even if there was spontaneous ignition, it may have been occasioned by some error in the manufacture of the six-ply bags (not the nitrate) or even in some of the nitrate or by contamination before the bags reached Baltimore.

As properly conceded by petitioners' counsel in their brief filed in the Court of Appeals, page 11:

> "Of course a carrier is not obligated to take steps to obviate dangers presented by a latent characteristic of cargo, the existence of which no reasonable inquiry would expose."

That the stowage was not negligent is proved overwhelmingly (*supra,* pp. 7-8), but even if there had been negligent stowage, petitioners' case would fail unless they further established that the bad stowage caused the fire (*Hoskyn & Co. Ltd.* v. *Silver Line, supra,* p. 13; *The Chester Valley,* 110 F. (2d) 592, C. C. A. 5).

Proof that the loss may have occurred from any one of several causes, for many of which no liability would exist, is not sufficient.

> *New York Central R. Co.* v. *Ambrose,* 280 U. S. 486, 490.

Whenever an issue of negligence is raised, the proof must necessarily show not only negligence, but also that more care would have avoided the loss (*Peltola* v. *Whiting,* 132 F. (2d) 857, C. C. A. 2; *Overton* v. *Wenatchee Orchard Co.,* 183 Pac. (2) 473). That also, is not shown in the case at bar.

The District Judge's finding that the preponderance of the evidence was that the fire was caused by spontaneous ignition of the Fgan was due to his palpable error in believing that 25° Centigrade was equal to 102° F. (A. 45). Twenty-five degrees Centigrade is easily changed to Fahrenheit by multiplying by 1.8 and adding 32° so that the correct Fahrenheit temperature is 77°, a moderate temperature. It is not true therefore that the Ocean Liberty lay at Brest "for four successive days in unusually hot weather" and that this was "the final straw" (A. 44) that caused the ignition.

THIRD POINT

Erroneous and misleading statements in the petition.

1. The petition states, page 7, that the only interest of Cosmopolitan Shipping Co. was to ascertain if the shipment of Fgan was prohibited or if burdensome restrictions were imposed.

The above statement is untrue. After the Fgan had been booked by the French government Cosmopolitan Shipping consulted the U. S. Lines which had carried enormous quantities of Fgan without accident, the Board of Underwriters of New York and the Coast Guard (A. 444-5).

The Board of Underwriters, an inspection agency maintained by the principal marine underwriters (A. 209, 211), specializes in safe methods of stowage and issues written instructions thereon (A. 263, 614).

The Coast Guard is charged by statute with the duty of establishing regulations with respect to the stowage of dangerous substances, supra, page 12. Their regulations of over 150 pages include all kinds of dangerous cargo.

Both the Board of Underwriters and the Coast Guard are unquestionably familiar with the chemical constituents and characteristics of the shipments with which they deal.

The Baltimore Fire Department is of course familiar with fire prevention and had especially studied Fgan (A. 109, 113, 272).

The position of the Cosmopolitan Shipping Co. is misconceived by petitioners. Cosmopolitan Shipping Co. did not undertake to load and stow the Ocean Liberty.

It was the duty of Cosmopolitan Shipping Co. to solicit and book outward cargoes and to arrange for the delivery of in-bound, being compensated by a percentage of the freight. A ship's agent does not load and stow the ship; loading and stowage is performed by the stevedore; the functions of agent and stevedore are entirely distinct. *The*

Picqua, 97 Fed. 649, 651. In all such matters the final decision lies with the master, *Olsen* v. *U. S. Shipping Co.,* 213 Fed. 18, C. C. A. 2; *The Colima,* 82 Fed. 665.

2. The petition states, page 8, that prior to the stowage of the Ocean Liberty there was "extant a mass of recognized authorities warning of the danger of spontaneous ignition" of Fgan when stowed as on the Ocean Liberty. The petition cites District Court findings 20 (A. 34), 23 (A. 28) and 26 (A. 41) which fail to support the assertion.

District Court Finding No. 20 quotes the compilation of authorities prepared for the Bureau of Mines by Mr. Scott in which it is stated that "there is no recorded instance of spontaneous heating in pure ammonium nitrate. * * * The paraffin-type coated materials used in the manufacture of ammonium nitrate fertilizer apparently make little or no contribution to spontaneous heating. * * * According to plant experience, fertilizer packed in the multiwalled paper bags at 93 degrees C. (199 degrees F.) does not heat further."

Department of Agriculture Circular 719, cited in Finding 20 (A. 36), stated that no evidence of spontaneous heating in Fgan could be found (R. 23). To the same effect is the Scott report, supra, page 9.

Finding 23 quotes the recommendations in the report of the National Board of Fire Underwriters, but overlooks the fact that paragraph 3, which is quoted, *relates solely to storage in a warehouse,* this paragraph being under the heading "Storage" and paragraphs 5-11 being headed "Handling" (A. 612).

As stated *supra,* these recommendations were adopted as Rules of the Baltimore Fire Department and were meticulously complied with when the Ocean Liberty was loaded, supra, page 8.

District Court Finding 26 (A. 40-42), without citation of supporting evidence, states that the carrier is liable

because it *"relied too largely on only inspection of the loading by public officials."*

This disregards the rule that when duly promulgated governmental regulations are complied with under the supervision of the officials charged with their enforcement, the party so complying cannot be charged with negligence because of his compliance, *supra*, page 12, R. 28.

3. The petition states, page 8, that the 6-ply paper bags in which the nitrate was packaged would necessarily become torn, with resulting increase of danger of fire. This risk was practically non-existent, since the Interagency Report states that, in the six years preceding 1947, 1,440,000 tons of Fgan had been produced and transported, more than half of which were shipped by vessels in export (A. 694). Each vessel carrying Fgan was, in substance, a giant test tube.

4. The petition states, page 8, that the fire in Fgan on the Grandcamp at Texas was "spontaneous," in support of which Dr. Kistiakowsky is cited, and the findings of the District Court (later reversed by the Court of Appeals) in the Texas City litigation.

It has already been pointed out that Dr. Kistiakowsky had been incorrectly informed that the Fgan when loaded was so hot that it could be handled only with "asbestos gloves" (*supra*, p. 9), and this induced an erroneous conclusion.

Fire broke out on the Grandcamp before the loading had been completed, and when the bags had been in stow in the hold for only 3 or 4 days. The Coast Guard found the probable cause of the fire to be careless smoking, and that finding was concurred in by the Interagency Committee (R. 24).

In the Texas City case, a District Court finding is:

> "The evidence does not enable me to state the exact process which produced the fire in the Fertilizer, but it was *in the nature of* spontaneous combustion or spontaneous ignition." (Italics ours.)

The statement, that the process which produced the fire was "in the nature of" spontaneous combustion or ignition, covers a broad range of possible causes. There is no definite finding that the fire was due to spontaneous combustion of the Fgan.

Furthermore, the decision of the District Court was unanimously reversed by the Court of Appeals (197 F. (2d) 771). Hutcheson, C.J., with whom Borah, C.J. concurred, said, page 785:

> "Because, however, of the way the case was tried, because, too, of the too sweeping nature of the findings and conclusions, I agree with the appellant that the findings are contrary to the truth and right of the case and clearly erroneous, and that the judgments should, therefore, be reversed and the cause remanded for trial anew."

It is obvious, therefore, that this erroneous finding of the District Court cannot be relied upon as establishing that the fire on the Grandcamp was due to spontaneous ignition.

5. The petition, at pages 8 and 9, refers to the report of the National Board of Fire Underwriters. This report was sent to the Baltimore Fire Department and all of its recommendations were meticulously followed in the stowage of the Ocean Liberty (*supra,* p. 8). In view of the above, it is obviously unimportant that no copy was received by Cosmopolitan Shipping Co., Inc., particularly because there was nothing in that report "specifically stating that the fertilizer was subject to spontaneous combustion" (Fdg. 26, A. 42).

6. The petition on page 9 contains a number of incorrect statements, such as that no representative of the Cosmopolitan Shipping Co., Inc., consulted with any qualified person concerning the loading and stowage of the Fgan. These erroneous statements have, we believe, been sufficiently dealt with (*supra*, p. 16).

7. The petition, at page 9, states that lower hold No. 3 was the hottest compartment of the vessel which is not correct (A. 465). The record contains a list of carefully taken temperatures in lower hold No. 3 of the Henry T. Scott (A. 633-637), which loaded Fgan near New Orleans in the latter part of May, 1947, about a month prior to the Ocean Liberty. The Henry T. Scott was a Liberty ship resembling in all essential characteristics the Ocean Liberty (A. 624, 598). The readings of thermocouples inserted in the stow indicated that the temperature in the hold was not increasing. The average temperature in the stow, when the last reading was taken, was 82° F (A. 635). Petitioners' leading expert testified that Fgan would not begin to heat spontaneously until it had reached a temperature of over 190° F. (*supra*, p. 10).

It is said that the bags were packed together tightly. "Tight" stowage meant merely that "the ship could take the cargo to sea and the vessel would be seaworthy" (A. 332). Tight stowage did not prevent ventilation (A. 140, 409). "Loose" stowage would have caused unseaworthiness.

Nor is it correct to state that the bags were completely "encased" in paper (A. 145). The method of the stowage is described *supra*, pages 6, 7.

8. The petition states at page 10 that, when the Ocean Liberty reached New York, the officers of the Cosmopolitan Shipping Co. became familiar with how the Fgan had been stowed at Baltimore and made the situation worse by utilizing the 'tween deck space, by stowing cargo therein and by battening down the hatch on the weather deck.

It is not true that Cosmopolitan's own officers became familiar with how the Fgan had been stowed at Baltimore. Cosmopolitan Shipping Co., Inc., learned from the stowage plan that ammonium nitrate and no other cargo had been stowed in lower holds 1, 3 and 5. They were not advised, however, as to the method of stowage or whether any extraordinary means of ventilation had been used. Kerwin, "Operating Manager" of Cosmopolitan Shipping Co., Inc. (Cargo App. 72), but not an officer, and Bentson, Assistant Operations Manager (Cargo app. 105) knew there was nitrate in hold No. 3, but did not know of the method of the stowage because the hatch was not open (Cargo App. 91, 93, 115).

Cosmopolitan Shipping Co., Inc., did know that the Fgan had been stowed at Baltimore by a most reliable stevedoring firm under the direct supervision of the Coast Guard, Board of Underwriters and Fire Department, all of whose instructions had been complied with, and further knew that the stowage met with the approval of the master and officers of the vessel (A. 446-7).

The claim that no cargo should have been stowed in the 'tween deck space, so as to allow ventilation through the hatches, is fantastic.

The lower hold of a ship is not ventilated through the hatches. The Ocean Liberty was equipped with four very large ventilators, one at each corner of the hold, and these ventilators would afford all of the ventilation that could by any possibility be needed. It has been held that even two ventilators to a hold are sufficient. *Spang Chalfant* v. *Dimon S.S. Co.*, 57 F. (2d) 965, 967, C. C. A. 2. No witness, expert or otherwise, even so much as suggested that cargo should not have been loaded in the 'tween deck space.

The recommendations of the Board of Underwriters required that all ventilators and pipe exits be covered with fine wire mesh (A. 614), and this could not have been done if the weather deck and 'tween deck hatches had been left open, in addition to which the ship would have been unseaworthy because of the serious risk of taking a sea on board in a storm.

9. The petition states, page 10, that the master should have been warned of the danger of the Fgan and also that the Fgan could not be examined to ascertain if it was heating.

As to the first point there is no duty to instruct a master as to the care of cargo or ship unless the owner is in possession of information which the captain does not have. *Tempus Spg. Co.* v. *Dreyfus* (1931), 1 K. B. 195, 204, aff'd (1931) A. C. 726. The master had been at Baltimore throughout the loading period, and had received instructions from the Fire Department; the care exercised by the master at Baltimore, New York and Brest show that the master well understood what was required (A. 536, 574).

The Fgan in the lower hold could have been easily examined by entering the hold through the masthouse (A. 590). Mr. Scott entered No. 3 hold of the Henry T. Scott after the ship sailed (A. 629).

10. The petition quotes, at page 11, an extract from the opinion of the Court of Appeals (R. 35), to the effect that, if there was any negligence in the stowage, it was that of Terminal Shipping Company and would not constitute the "actual fault or privity" of the carrier, i.e., the respondent A/S J. Ludwig Mowinckels Rederi.

The Court of Appeals, in a previous part of its opinion, had held that there was no negligence in the stowage of the Fgan on the part of Terminal Shipping Company or anyone else (*supra*, p. 3).

That part of the opinion criticized by petitioners was not a necessary part of the decision and is to be considered as dictum.

In any event, the above conclusion of the Court of Appeals is entirely sound and not "shocking" as characterized by petitioners.

Petitioners have conceded (*supra*, p. 2, A. 399) that there is no *personal* fault on the part of respondent Mowinckels, but seek to attribute to Mowinckels alleged negligence on the part of either Cosmopolitan Shipping Co. or Terminal Shipping Company.

In *Boston Marine Ins. Co.* v. *Metropolitan Redwood Lumber Co.*, 197 Fed. 703, 709, C. C. A. 9, the Court of Appeals held that a shipowner, in order to avail himself of the limitation of liability statutes, was not required to

> "acquaint himself with the science of navigation or acquire expert knowledge concerning his vessel, its equipment, its machinery, or the necessary crew therefor, or * * * place between himself and the master an intermediary who shall possess such knowledge, * * * " (p. 709).

The respondents knew that the Ocean Liberty was to load ammonium nitrate but they were not required to become Super-Scientists and know more about ammonium nitrate than did the skilled organizations which supervised and approved the stowage. If there was negligence in failing to make an adequate study of the characteristics of Fgan on the part of the Coast Guard, the Board of Underwriters, the Fire Department or Terminal Shipping Co., this would not impose any liability on either of the respondents. *The Annie Faxon, supra,* p. 12; *Petition of Canadian Pacific R'way Co.*, 278 Fed. 180, at p. 189, and cases cited; *The Columbia*, 25 F. (2d) 516, affirmed 25 F. (2d) 518, C. C. A. 2.

11. The petition, at pages 12 and 13, quotes extracts from the dissenting opinion and from the opinion of the District Judge.

In the dissenting opinion, it is said that there was an onerous duty to use due care as to the nature and qualities of Fgan.

Conceding, for the sake of argument, that such a duty existed, it was fully performed as shown by the extraordinary precautions taken when the Fgan was loaded and stowed (*supra,* p. 5).

With reference to the extracts from the opinion in the District Court, quoted in the petition, it should be pointed out that the District Judge disabled himself from reaching a correct conclusion by his insistence on deciding the case

without waiting for the testimony to be typed (Typewritten Record, p. 1006, not printed in either Appendix). As the Trial Judge did not have before him the text of the expert testimony, erroneous conclusions were almost unavoidable; for the same reason counsel were unable to refer to this expert testimony with any exactitude in the briefs submitted at the close of the trial.

12. The petition further states, page 16, that "Cosmopolitan gave no directions to Terminal to consult with a chemist and ascertain what dangers should be guarded against". This is a trivial point because Terminal Shipping Co. did consult a chemist (*supra*, p. 11).

The Assistant Operating Manager of Cosmopolitan did write to Terminal on June 11th, notifying Terminal to "consult the U. S. Coast Guard, who must be notified and under whose direction this commodity is loaded."

By the U. S. Statute, the Coast Guard was given jurisdiction over the loading of Fgan (*supra*, p. 12), and that jurisdiction was exercised in this case. The Coast Guard had conducted a lengthy investigation as to the fire at Texas City (A. 258), and the Chairman of the Interagency Committee was the head of the Coast Guard's Hazard Prevention Section, Merchant Vessel Inspection Division (A. 692, 693). The presumption applies that the Coast Guard adequately performed it duty of investigating the cause of the fire on the Grandcamp, and such characteristics of Fgan as might render it hazardous. *U. S.* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 15; *U. S.* v. *Rock Royal Cooperative*, 307 U. S. 533, 567, 568. In addition to the Coast Guard, the Board of Underwriters was also consulted as a matter of course.

13. The petition cites, at page 16, some cases which did not involve fire damage to cargo, as did the case at bar, and also *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro*, 159 F. (2d) 661, C. C. A. 2. In that case, the s/s Pocone came into New York, having had a fire in her coal

bunkers while at sea. An officer of the shipowner was notified that the coal bunkers had been on fire but failed to make an adequate investigation. This was held to be the neglect of the shipowner. Obviously, the case is entirely different from that now under consideration.

At page 17, the petition cites *Cornec* v. *B. & O. RR. Co.* (*The Richelieu*), 48 F. (2d) 497, C. C. A. 4, in which case an explosion had occurred during the loading of pitch on a French vessel. The explosion was due to a cloud of pitch dust being set on fire by the emission of sparks and flashes from the worn electrical machinery of the railroad. This was held to be negligence on the railroad's part because of the "general and common knowledge existent as to the explosive character of carbonaceous dusts in general." In fact, just before the explosion, pitch dust had been ignited by electricity on two separate occasions, 48 F. (2d) at page 502.

14. The petition, at page 20, states the following as its second point:

> "II. Does the fire exception of the Carriage of Goods by Sea Act provide a carrier with an exemption from liability for damage to cargo discharged on shore after an unjustifiable deviation?"

The above point is not difficult to answer.

(a) There was no deviation. The District Court so held (*supra*, p. 2), and this conclusion was affirmed by the Court of Appeals (R. pp. 35, 36; see too the opinion of the District Court at A. 56 through A. 63). The petition does not challenge the correctness of these conclusions, but makes merely the bald statement that there was a deviation.

(b) Petitioners admit that there is nothing in their deviation point in so far as the cargo on board the Ocean Liberty is concerned, but endeavor to draw a distinction with respect to the comparatively small amount of cargo, slightly injured by fire while on the dock.

The distinction sought to be drawn is that, while, by statute, all liability was eliminated so long as the cargo was on board the ship, this statutory protection ceased the moment the cargo was placed on the wharf, even though it was hoped that the cargo would be reloaded as soon as the discharge of the French Government cargo (not included in this litigation) had been completed.

This is not a correct construction of the statutes involved. The Fire Statute, R. S. 4282, 46 U. S. C. 182, covers loss or damage to merchandise "which shall be shipped, taken in or put on board any such vessel by reason or by means of any fire happening to or on board the vessel * * *." In the present instance, the "merchandise," damage to which is claimed, was put on board the vessel, and the fire happened to or on board the vessel. The fire did not originate on shore; the fire on the vessel proximately caused the fire damage to the merchandise.

The Carriage of Goods by Sea Act (quoted, R. 30) should be construed in the same way. By that Act, the term "carriage of Goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship, 46 U. S. C. 1301(e). The term "discharged" when so used does not mean a mere temporary putting of the goods ashore, with the expectation that the voyage may be resumed. The "discharge" referred to in the statute obviously means a discharge at the port of delivery where the carrier's liability is terminated.

(c) However, even were the above conclusions incorrect, it would be immaterial because the contract of carriage provides:

> (1) that the "provisions of the Carriage of Goods by Sea Act are to govern after the goods are discharged from the ship * * *" (A. 20);
>
> (2) that the carrier is not to be liable to answer for or make good any loss or damage to the goods, even after discharge of the ship by reason or by means of

any fire whatsoever, unless such fire shall be caused by its design or neglect (A. 23).

Furthermore, by the terms of the contract of carriage, the above provisions are binding

> "in every contingency, wheresoever and whensoever occurring, and *also in the event of deviation* * * *" (A. 19). (Italics ours.)

Consequently, even if there were a deviation, which is denied, there can be no liability on the part of the carrier.

15. The petition, at pages 23-27, proposes "additional questions to be urged if the petition is granted." As these questions are not of sufficient importance to justify the granting of a petition for certiorari, it is inappropriate for respondents to discuss them at the present time.

16. The petition, at pages 27-28, lists six alleged reasons for the granting of the writ. While the general statement is made that the decision is in conflict with the rules in other circuits, this is not in fact the case and no authorities are adduced in support of petitioners' contention.

The case at bar was decided on the basis of its particular facts, which showed that there was no negligence on the part of anyone concerned, and it is not of actual interest to any litigants other than the parties thereto.

LAST POINT

The petition for a writ of certiorari should be denied.

Dated, January 5, 1953.

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